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STATE OF NEW HAMPSHIRE
WATER COUNCIL

AUG 1 8 2003

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In Re: Section 401 Water Quality Certificate No. 2003-001
(Proposed Falls Way Subdivision: September Drive and Breakfast Hill Road)

NOTICE OF APPEAL

NOW COMES the Conservation Law Foundation ("CLF"), by and through its attorney, Thomas F. Irwin, and appeals the New Hampshire Department of Environmental Services' ("Department") issuance of Section 401 Water Quality Certificate No. 2003-001. CLF respectfully submits this Notice of Appeal in accordance with Env-WC 203.03 and, responding to the specific information requests contained therein (*see italicized headings below*), states as follows:

Copy of the decision or order which is being appealed:

CLF is appealing the Department's issuance of Section 401 Water Quality Certificate No. 2003-001 ("the certificate") for the proposed Falls Way Subdivision in Greenland, New Hampshire. A copy of the certificate is appended hereto as **Exhibit A**.

Name and address of person seeking relief:

The name and address of the appellant are: Conservation Law Foundation, 27 North Main Street, Concord, New Hampshire. CLF is a member-supported, non-profit environmental advocacy organization that works to address environmental issues—including water quality issues—in New Hampshire and other New England states. CLF has numerous members who have a direct, substantial and special interest in whether the proposed Falls Way Subdivision project is permitted to be constructed. These members include, but are not limited to, the Town of Greenland Conservation Commission, which pursuant to RSA 36-A was established "for the proper utilization and protection of watershed resources" within Greenland, and which has actively opposed the proposed project based on water quality and other related project impacts in proceedings before the Department's Wetlands Bureau; several private property owners identified by the applicant as adjoining riparian or littoral owners, including Jane M. Man, Derek I. and Jerilyn L. Simpson, and Thomas J. and Gayle A. Sutton, each of whom is opposed to the proposed subdivision based on its impacts to their respective properties and who will likely suffer a direct, specialized harm greater than that of the general public if the proposed project is built and operated; and Mr. and Mrs. Lt. Colonel Wallace S. Berg, who own property at 683 Post Road, Greenland with frontage of approximately 1200' on Norton Brook (one of the receiving water bodies at issue), who are opposed to the proposed project based on its impacts to Norton Brook and their property, and to Sanderson Pond, which is associated with Norton Brook and which the Bergs use for recreational purposes, and who will potentially suffer a direct, specialized harm greater

than that of the general public if the proposed project is built and operated. CLF actively participated in the Department's process through the submission of substantial comments and materials for the Department's review.

Statement of relief requested and statutory provisions pursuant to which the relief is sought:

CLF seeks a decision of the Water Council invalidating Section 401 Water Quality Certificate No. 2003-001 and further ordering that the Department either (1) refrain from considering a request for a water quality certificate for the proposed Falls Way Subdivision until such time as it has adopted legally effective regulations relative to Section 401 Water Quality Certification, or (2) transfer the applicant's request for a water quality certificate to the U.S. Environmental Protection Agency ("EPA"). CLF seeks this relief on the grounds that the Department's issuance of the certificate was contrary to statute and rules (namely, Section 401 of the Clean Water Act (33 U.S.C. § 1341); New Hampshire's Water Quality Standards (RSA 485-A:8 and Env-Ws Chapter 1700); RSA 541-A:7, and, without in any way waiving CLF's argument, below, regarding their legal invalidity, Env-Ws Part 452, Env-Ws 454.01-.04 and Env-Ws 455.02) and was arbitrary and capricious.

Concise and explicit statement of facts upon which the Water Council is expected to rely in granting relief:

Endicott General Partnership ("the applicant") proposes to construct a 79-lot residential subdivision and associated road network on a 211-acre parcel of undeveloped land rich with wetlands and other important aquatic resources including Norton Brook, a tributary to the Winnicut River which flows into Great Bay. The applicant's proposal will have significant direct and indirect impacts on wetlands, aquatic resources, and wildlife, including the introduction of roads, homes, lawns and human activities that will result in pollutants being discharged into surface waters, hydrologic changes, and habitat fragmentation. In light of these impacts, the U.S. Army Corps of Engineers ("Corps") has required the applicant to apply for a federal wetlands permit pursuant to Section 404 of the Clean Water Act. This federal permit requirement, in turn, triggered the requirement that the applicant apply for a water quality certificate pursuant to Section 401 of the Clean Water Act. The applicant submitted an application for a water quality certificate on April 29, 2003. CLF submitted substantial comments and materials to the Department, including a copy of comments submitted by the EPA to the Corps, raising significant concerns with the impacts of the proposed project on wetlands, surface waters and related natural resources. On July 17, 2003, the Department issued the certificate which is the subject of this appeal. The Department's issuance of the certificate is unlawful, arbitrary and capricious, and should be deemed invalid and without legal effect, on the following grounds.

I. The Department lacked legal authority to consider the application, and to issue the certificate, because its regulations have expired and are without legal effect.

1. The Department's Section 401 Water Quality Certificate regulations (Env-Ws 451-455) became effective on March 6, 1995 and, pursuant to RSA 541-A:7, expired on March 6, 2003.

2. At the time it received the subject application, the Department had no legal authority to consider the applicant's certification request.

3. Because the Department lacked authority to consider the applicant's certification request, only the EPA could review and consider the application. 33 U.S.C. § 1341(a)(1) ("In any case where a State or interstate agency has no authority to give such a certificate, such certification shall be from the Administrator.").

II. The applicant failed to provide necessary information pertaining to, and the Department failed to adequately assess, the water quality impacts of the proposed project.¹

4. The application materials submitted to the Department are devoid of any assessment of existing baseline conditions for the receiving waters, namely wetlands associated with Norton Brook, Norton Brook itself, the Winnicut River and Great Bay.

5. The application materials submitted to the Department are devoid of any assessment of pollutant loadings that will result from the project, including the chemical composition and temperature of water that will be discharged from the project, and the water quality impacts thereof.

6. As a result of these deficiencies, the applicant failed to satisfy critical application criteria, and the Department could not lawfully and reasonably conclude that the proposed project will not violate state water quality standards. *See* Ws 454.01(b)(11), 455.02(a), (c).

III. The applicant failed to provide necessary information pertaining to, and the Department failed to consider, the water quality impacts of the residential development.

7. CLF hereby incorporates into this ground for appeal, as if fully set forth herein, all of the grounds set forth in, and under, Item II, above.

8. The materials submitted by the applicant, and the Department's certification analysis, focused on roadways and roadway crossings of wetlands and aquatic resources. Information provided by the applicant, and the Department's review,

¹ By raising this and subsequent grounds for appeal, CLF in no way waives its initial ground for appeal, above, relative to the legal ineffectiveness of the Department's Section 401 regulations.

failed to properly consider the water quality impacts that will result from the actual residential development and the human activities it will introduce to this undeveloped parcel (i.e., cars, lawns, gardens, pets, water consumption, septic systems, mosquito control).

9. The construction and/or operation of the residential subdivision will likely result in the generation, transport and discharge of numerous pollutants, *via* stormwater during precipitation events, which can include heavy metals (from gutters and mechanical wear and tear on machinery), bacteria (from animal wastes), sediment (from construction, winter sanding, and lawns and gardens), nutrients (from fertilizers and atmospheric deposition), hydrocarbons (from vehicles), sodium chlorides (from road and driveway salting), and thermal pollution (from solar heating of rooftops, driveways and roads).

10. The residential subdivision also could result in water quality impacts from the contamination of groundwater and its migration and discharge into wetlands and surface waters. Such contamination could include nutrients, toxics, and chlorides from the 79 individual septic systems proposed to be a part of the project, as well as contaminants associated with lawn care and domestic maintenance activities.

11. The residential subdivision also could result in water quality impacts resulting from reduced water *quantity*, as a result of the introduction of impervious surfaces and as a result of water consumption associated with the 79 private wells proposed for the project.

12. The Department's failure to properly assess the water quality impacts that will result from the *entire* proposed project violates the clear language of its rules. *See, e.g.,* Env-Ws 455.02 (referring to "construction or operation of the *project*"). It also is grossly inconsistent with the Department's own application of its rules in its review and denial of Section 401 certification requested for a nearby 25-lot residential subdivision on Ocean Road in Portsmouth. In that case, the Department explicitly stated that for purposes of its Section 401 review, the "project" included a proposed roadway crossing through wetlands *and* the proposed residential subdivision it was intended to access and service. *See Exhibit B.* The Department's failure to assess the water quality impacts of the construction and operation of the applicant's entire project proposal, and to ignore recent precedent from a case nearly identical to this one, renders its decision unlawful, unreasonable, arbitrary and capricious.

IV. The applicant failed to provide adequate information pertaining to, and the Department failed to consider, the overall ecological impacts of the proposed project.

13. CLF hereby incorporates into this ground for appeal, as if fully set forth herein, all of the grounds set forth in, and under, Items II and III, above.

14. The proposed project (the proposed road network and subdivision as a whole) will, if permitted, have significant direct and indirect impacts on wildlife and

wildlife habitat. The proposed parcel contains a rich mosaic of wetlands and uplands which, in combination, provide important habitat and food sources for a wide variety of wildlife species. The proposed parcel also contains vernal pools and an Atlantic White Cedar community.

15. The applicant has failed to provide adequate information regarding the existing wildlife habitat functions and values of the parcel, and the manner in which the proposed project will impact those functions and values.

16. The full ecological function and value of the proposed project location (including its value for animal, plant and aquatic species) and the impact of the proposed project on those functions and values, is a critical and necessary element of the Department's Section 401 certification review. In the above-referenced Ocean Road development case, for example, the Department denied Section 401 certification based in large part on the overall ecological impacts (including impacts on animal and plant species) that would result from the proposed subdivision. *See Exhibit B.* The Department's failure to engage in this analysis, and to ignore recent precedent, is unlawful, unreasonable, arbitrary and capricious.

V. The applicant submitted, and the Department relied upon, incomplete information.

17. CLF hereby incorporates into this ground for appeal, as if fully set forth herein, all of the grounds set forth in, and under, Items II through IV, above.

18. In addition to failing to provide baseline water quality data for receiving water bodies, pollutant loading analyses, and other information relative to the impacts of the proposed project, the applicant submitted two Drainage Analysis and Erosion and Sediment Control Plans (dated May 22, 2003 and May 28, 2003) which were incomplete. Specifically, neither of these plans included appendices and sheets referenced therein. Moreover, upon information and belief, these analyses did not take into account impervious surfaces related to driveways and rooftops within the proposed 79-lot subdivision.

19. Because the applicant failed to submit all the information required by Env-Ws 454.(b)(11) and failed to provide information that was essential for the Department's Section 401 review, the Department's decision is unlawful, arbitrary and capricious.

VI. The applicant failed to demonstrate that the proposed project will not violate state water quality standards.

20. CLF hereby incorporates into this ground for appeal, as if fully set forth herein, all of the grounds set forth in, and under, Items II through V, above.

21. The record does not support a finding, which is necessary in order for the Department to issue a Section 401 certificate, that the "construction or operation of the project will not violate state surface water quality standards." Env-Ws 455.02(c).

22. In addition to the numerous deficiencies described above, the applicant failed to provide necessary information pertaining to, and the Department failed to assess, whether the proposed project will result in violations of several water quality standards, including but not limited to standards relating to benthic deposits (Env-Ws 1703.08); oil and grease (Env-Ws 1703.09); turbidity (Env-Ws 1703.11); slicks, odors and surface floating solids (Env-Ws 1703.12); temperature (Env-Ws 1703.13); nutrients (Env-Ws 1703.14); biological and aquatic community integrity (Env-Ws 1703.19); toxic substances, including but not limited to aluminum, cadmium, chlorides, chromium (+3 and +6), copper, iron, lead, manganese, nickel, zinc and various herbicides and pesticides (Env-Ws 1703.21); and antidegradation (Env Ws 1708.01-.11).

VII. The Department unlawfully and unreasonably issued certification conditioned on the applicant's preparation of information which should have been provided as part of the Section 401 application and review process.

23. CLF hereby incorporates into this ground for appeal, as if fully set forth herein, all of the grounds set forth in, and under, Items II through VI, above.

24. The Department issued the certificate with the conditions that the applicant submit a plan for the "long-term maintenance of stormwater BMPs" (Condition D-3) and a plan for sampling and analyzing various chemical parameters prior to and after completion of the project (Condition D-4).

25. The information and analyses required under these conditions should have been developed and submitted for the Department's review *before* the issuance of the certificate. Absent such information and analyses, the Department could not lawfully and reasonably conclude that the project will not result in violations of New Hampshire water quality standards.

26. Moreover, the plans referenced in Conditions D-3 and D-4 should have been developed before issuance of the certificate to allow the public to review and comment thereon. By requiring the development of these plans as a post-certification condition, the Department has denied the public the ability to review and comment on their sufficiency and has prematurely, and without reasonable basis, concluded that the proposed project will not violate state water quality standards.

VIII. The Department's certificate is unlawful and unreasonable because it was based on a process that precluded meaningful public participation.

27. CLF hereby incorporates into this ground for appeal, as if fully set forth herein, all of the grounds set forth in, and under, Items II through VII, above.

28. CLF requested that the Department conduct a public hearing on the subject Section 401 application. By letter dated July 17, 2003, the Department denied CLF's request, stating that CLF's request was untimely pursuant to Env-Ws 454.04 because it was not made within 20 days of a public notice published by the Corps.

29. The Corps' public notice of this proposed project pertained to the applicant's request for a *Section 404 wetlands permit*. The public notice's only reference to the Section 401 certification process states: "The following authorizations have been applied for, or have been, or will be obtained: . . . Water Quality Certification in accordance with Section 401 of the Clean Water Act." The notice provides *no* information relative to the Department's Section 401 process, and no notice of a 20-day time period for members of the public to request the Department to hold a public meeting.

30. On the facts of this matter, the Department's use of the Corps' Section 404 public notice to trigger the 20-day time period was unreasonable and precluded due process by foreclosing the opportunity for meaningful public participation by interested members of the public, including abutting landowners and the Town of Greenland Conservation Commission. The unreasonableness of the Department's reliance and application of its 20-day deadline on the facts of this case is all the more obvious in light of the fact that, according to the Department, the deadline for requesting a public meeting was May 7, 2003, a mere six business days after the applicant submitted its certification request.

IX. The Department's certificate is unlawful and unreasonable because it fails to address the numerous issues raised in comments and materials submitted by CLF.

31. CLF hereby incorporates into this ground for appeal, as if fully set forth herein, all of the grounds set forth in, and under, Items II through VIII, above.

32. CLF submitted substantial comments and materials identifying numerous issues related to the water quality and ecological impacts of the proposed project. Among those materials, CLF submitted comments from the EPA to the Corps raising significant concerns, as well as comments of qualified experts. In addition to issues addressed above, CLF's comments and materials addressed, *inter alia*, the cumulative impacts of the proposed project, New Hampshire's smart growth legislation codified at RSA 9-B, and the importance of assessing the impacts of the proposed project within its true ecological context (i.e., as part of the Great Bay estuary ecosystem). With respect to

the latter point, it is critical to note that both the estuary portion of the Winnicut River and portions of Great Bay already violate water quality standards for their failure to support fish consumption and shellfishing uses as a result of contaminants (polychlorinated biphenyls, dioxin and total fecal coliform) from unknown sources.

33. The Department failed to in any way address the substantial comments and materials submitted by CLF, rendering its decision unlawful and arbitrary and capricious.

X. The Department's certificate is unlawful and unreasonable because the Department failed to coordinate with local, state and federal agencies.

34. CLF hereby incorporates into this ground for appeal, as if fully set forth herein, all of the grounds set forth in, and under, Items II through IX, above.

35. The Department has formally committed to coordinating with local, state and federal agencies in reviewing Section 401 certificate requests. *See* EPA/NHDES Performance Partnership Agreement (March 2003), PPA Submission for 10/1/02-9/30/03.

36. The Department failed to coordinate with, or seek comments and assistance from, the Town of Greenland Conservation Commission (which has actively opposed the Department's issuance of a state wetlands permit for the project); the New Hampshire Fish & Game Department (which has expertise in matters relating to the proposed project's impacts to species and wildlife habitat, and which—as the Department was aware—stated that the proposed project's impacts would be a matter of concern for the agency); the EPA (which has visited the proposed site and has expressed serious concerns); the U.S. Geologic Survey (which is undergoing a substantial study of groundwater sustainability in New Hampshire's seacoast region); the U.S. Fish and Wildlife Service (which has substantial expertise in ecological matters related to the proposed project); and the Corps (which is in the process of reviewing the applicant's request for a Section 404 wetlands permit).


37. The Department's decision is grossly inconsistent with its stated commitment to render Section 401 determinations in coordination with other agencies, rendering its decision unlawful, arbitrary and capricious.

WHEREFORE, Conservation Law Foundation respectfully requests that the Water Council hold a hearing on this appeal and:

- A. Issue a decision invalidating Section 401 Water Quality Certificate No. 2003-001 as unlawful, arbitrary and capricious and without effect;
- B. Order the Department either to refrain from considering the subject certification request until it has promulgated effective 401 Water Quality Certification Regulations, or to transfer the certification request to the EPA; and
- C. Grant such other relief as it deems appropriate and just.

Respectfully Submitted,

CONSERVATION LAW FOUNDATION

By: 
Thomas F. Irwin, Staff Attorney
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
603/225-3060

Date: August 18, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal has this day been hand-delivered to Department of Environmental Services Commissioner Michael Nolin and Water Division Administrator Harry Stewart, and sent via first class U.S. Mail to Malcolm R. McNeill, Jr., Esq., counsel for Endicott General Partnership.

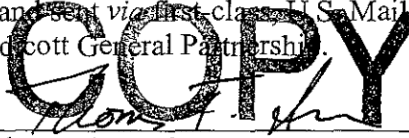

Thomas F. Irwin

EXHIBIT A



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-2457 FAX (603) 271-7894



Endicott General Partnership
Attn: Joseph Falzone, Trustee
123 Water Street, Unit 4SE
Exeter, NH 03833

WATER QUALITY CERTIFICATE

In Fulfillment of

NHDES 401 Water Quality Certification Regulations (Env-Ws 451 - 455)
and
Section 401 of the United States Clean Water Act (33 U.S.C 1341)

401 Certificate # 2003-001

Project Name: Falls Way Subdivision: September Drive and Breakfast Hill Road
Project Location: Greenland, New Hampshire
Affected Waterbody: Norton Brook, Winnicut River, Unnamed wetlands
Owner/Applicant: Endicott General Partnership
Joseph Falzone, Trustee
123 Water Street, Unit 4SE
Exeter, NH 03833

Appurtenant Permit(s): NHDES Wetlands Permit No. 2002-01268
NHDES Site Specific Permit No. WPS-6429
USACE Dredge and Fill File No. 200202434

DATE OF APPROVAL: July 17, 2003
(subject to Conditions below)

A. INTRODUCTION

Endicott General Partnership proposes the development of a residential subdivision in Greenland, NH. The project includes new construction of access roads to support the development of 79 residential lots.

This 401 Water Quality Certificate (Certificate) documents laws and regulations, determinations, and certification conditions relative to the application materials submitted under letter dated April 29, 2003.

B. STATEMENT OF FACTS AND LAW

- B-1. Section 401 of the United States Clean Water Act (Title 33 U.S. Code, Chapter 26, Subchapter IV) provides that "any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title".

- B-2. Env-Ws 451-455, *401 Water Quality Certification Regulations*, effective March 6, 1995, adopted by NHDES under the authority of RSA 485-A:6, VII, provides for the implementation of Section 401 in the State of New Hampshire.
- B-3. Env-Ws 1700, *Surface Water Quality Regulations*, effective December 3, 1999, fulfills the requirements of Section 401 that the State of New Hampshire adopt water quality standards consistent with the provisions of the Clean Water Act.
- B-4. Env-Ws 452.02 defines a discharge as any addition of pollutants to the surface waters of the state, or release of water which alters the physical, chemical or biological condition of surface waters of the state.
- B-5. Env-Ws 1702.18 defines a discharge as:
- (1) The addition, introduction, leaking, spilling, or emitting of a pollutant to surface waters, either directly or indirectly through the groundwater, whether done intentionally, unintentionally, negligently, or otherwise; or
 - (2) The placing of a pollutant in a location where the pollutant is likely to enter surface waters.
- B-6. Env-Ws 1702.39 defines pollutant as dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.
- B-7. Env-Ws 1702.46 defines surface waters as "perennial and seasonal streams, lakes, ponds and tidal waters within the jurisdiction of the state, including all streams, lakes, or ponds bordering on the state, marshes, water courses and other bodies of water, natural or artificial," and waters of the United States as defined in 40 CFR 122.2.
- B-8. Env-Ws 1701.02 provides that the surface water quality regulations shall apply to all surface waters and to any person who causes point or nonpoint source discharge(s) of pollutants to surface waters, or who undertakes hydrologic modifications, such as dam construction or water withdrawals, or who undertakes any other activity that affects the beneficial uses or the level of water quality of surface waters.
- B-9. Env-Ws 1703.01 (c) states that all surface waters shall provide, wherever attainable, for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the surface waters.
- B-10. Env-Ws 1703.19 (a) states that the surface waters shall support and maintain a balanced, integrated and adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of similar natural habitats of a region.
- B-11. Env-Ws 455.02 (Approval Criteria) states that before a water quality certificate can be issued, the following conditions must be met:
1. All requirements of Env-Ws 454 and Env-Ws 455 have been met;
 2. All state and/or federal permits necessary for construction and operation of the project have been obtained or shall be issued upon approval of the application by the division; and
 3. Construction or operation of the project will not violate state surface water quality standards.

C. FINDINGS

- C-1. Construction and operation of the project requires Water Quality Certification under Section 401 of the Clean Water Act and Env-Ws 451.02. The U.S. Army Corps of Engineers provided public notice of this project on April 17, 2003, which satisfies the requirements of Env-Ws 454.03.

- C-2. The wetlands, perennial and/or intermittent streams, and river in the project area are surface waters of the state under Env-Ws 1702.46.
- C-3. Drainage from the project area to surface waters constitutes a discharge under the definitions of Env-Ws 1702.18 and Env-Ws 452.02.
- C-4. The requirements of Env-Ws 455.02 (b) have been satisfied in that the Applicant has applied for and received a State wetlands permit from the NH Department of Environmental Services. The U.S. Army Corps of Engineers Wetlands Permit cannot be issued until the State issues a 401 Water Quality Certificate.
- C-5. The installation of culverts on Norton Brook may temporarily increase turbidity levels downstream from the project area, particularly during wet weather events, and may contribute to long-term sediment retention in and/or transport through the downstream reaches of these waterways. The implementation of best management practices (BMP) for controlling soil erosion is included as mitigation during construction of the project.
- C-6. The use of the completed access roads by vehicular traffic necessitates anti-icing/deicing and/or snow removal during the winter months. This may cause elevated chloride concentrations in surface waters during winter months as a result of melt water runoff.
- C-7. The use of the completed access road by vehicular traffic typically causes deposition of indeterminate amounts of trace metals, such as copper, lead, and zinc on paved surfaces. Copper, lead, and zinc are predominant constituents of roadway runoff.
- C-8. The establishment of roadside vegetation after completion of the project is augmented by the use of nitrogen and phosphorus-based fertilizers. Nutrient enrichment of surface water may occur through runoff, specifically if fertilizers are applied immediately prior to rain or thaw events. Nutrient enrichment may contribute to changes in dissolved oxygen dynamics of surface waters. The implementation of best management practices (BMP) for fertilizer application is included as mitigation during construction of the project.
- C-9. Norton Brook is a Class B waterway. Therefore, Class B New Hampshire surface water quality standards apply to this project. Class B waterways are considered suitable for fishing, swimming, and, after adequate treatment, as a water supply, and may be affected by turbidity levels, nutrient levels, or aqueous metals concentrations that exceed New Hampshire Class B surface water quality standards.
- C-10. Mitigation measures for the protection of surface water resources are referenced in the application materials submitted for this Certificate. These measures include the construction of catch basins, grassed swales, and vegetated treatment swales for the treatment of storm water runoff, which are not considered surface waters of the state, pursuant to 40 CFR 122.2.
- C-11. The mitigation measures proposed for this project are intended to protect surface water resources. Therefore, proper installation and maintenance throughout the duration of the project is required to ensure maximum functionality and effectiveness.
- C-12. Water quality monitoring is appropriate during and after construction activities, pursuant to Section 401 of the United States Clean Water Act (Title 33 U.S. Code, Chapter 26, Subchapter IV, Section 1341(d)), which provides that "any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations...and shall become a condition on any Federal license or permit subject to the provisions of this section".

D. WATER QUALITY CERTIFICATION CONDITIONS

- D-1. At no time shall the construction and/or operation of this project cause the violation of Class B surface water quality standards. If it is determined that Class B surface water quality standards are being violated, additional conditions may be imposed or conditions amended by NHDES in accordance with Env-Ws 455.

- D-2. The conditions in NH Wetlands Bureau Permit No. 2002-01268, as issued for this project, including any amendments, are considered conditions of this Certificate and must be strictly followed.
- D-3. The applicant shall submit a schedule and plan for long-term maintenance of stormwater BMPs. The applicant shall maintain all components of the roadway stormwater management system until it is formally accepted by the municipality or is placed in the jurisdiction of a legally created association that will be responsible for the maintenance of the system. After acceptance, the municipality or legally created association shall maintain all components of the roadway stormwater management system in accordance with the stormwater maintenance plan.
- D-4. Water samples shall be collected from Norton Brook, upstream of Interstate 95, prior to and after construction of the access road. Samples shall be analyzed for dissolved oxygen, temperature, specific conductance, chloride, nutrients, biochemical oxygen demand, metals (total copper, total lead, total zinc), hardness, and pesticides in Norton Brook. The applicant shall submit a sampling and analysis plan to the NHDES Watershed Management Bureau for review and approval at least 180 days prior to the anticipated date of full operation of the access road. The plan shall include sampling during wet weather and dry weather.
- D-5. Roadside fertilizers used for the reestablishment of vegetation shall be applied in such a way as to minimize losses during runoff events. This includes proper timing of application and amounts of material.
- D-6. The terms and conditions of this Water Quality Certificate may be amended and additional terms and conditions added as necessary to ensure compliance with New Hampshire water quality standards, when authorized by law, and after notice and opportunity for hearing.

E. WATER QUALITY CERTIFICATION APPROVAL

Based on the determinations and conditions noted above, NHDES hereby issues this Water Quality Certificate in accordance with NHDES 401 Water Quality Certification Regulations (Env-Ws 451-455) and Section 401 of the United States Clean Water Act (33 U.S.C. 1341).

F. APPEAL

If you are aggrieved by this decision, you may appeal the decision to the Water Council. Any appeal must be filed within 30 days of the date of this decision, and must conform to the requirements of Env-Wc 200. Inquires regarding appeal procedures should be directed to Jim Ballentine, NHDES Council Appeals Clerk, 6 Hazen Drive, PO Box 95, Concord, NH 03302-0095; telephone 603-271-6072.

If you have questions regarding this certification, please contact Paul Piszczek of this office at 271-2457.

COPY

Paul M. Currier
Administrator, NHDES Watershed Management Bureau

cc: Laurie Suda, ACOE
Greenland Conservation Commission
Greenland Planning Board
Adair Fiorillo, NH Soil Consultants, Inc.

EXHIBIT B



September 17, 1999

David DesFosses
Millette, Sprague, Colwell
501 Islington Street
PO Box 4006
Portsmouth, NH 03802-4006

RE: Great Bog, Portsmouth, New Hampshire
ACOE# 1998-02590, NHWP 397-02175, NHSSP #WPS-5184

A. INTRODUCTION

The above-referenced project ("the Project") at Great Bog in Portsmouth consists of dredging and filling 34,226 square feet of wetlands to construct an access roadway within a 60-foot long, 3-foot by 6-foot box culvert stream crossing; roadway shoulder stabilization area, and a common drive and culvert crossing to develop a 25-lot residential subdivision on 70.5 acres of a 189-acre parcel, with the remaining 118.5 acres to be given to the City of Portsmouth for conservation. Utilities for the subdivision include city water and on-lot septic systems. The Project is further described in the Public Notice dated June 1, 1999, on file with the US Army Corps of Engineers, 696 Virginia Road, Concord, MA 01742. For the purposes of this document, the Project consists of the entire development, including upland portions.

Ocean Road Development Corporation ("the Applicant") has applied for a federal permit under Section 404 of the federal Clean Water Act ("The Act") (33 U.S.C. 1344) and has submitted an application for a Water Quality Certification under Section 401 of the Act (33 U.S.C. 1341) to the Department of Environmental Services ("DES").

B. STATEMENT OF FACTS AND LAW

1. Env-Ws 430, Surface Water Quality Regulations, effective October 5, 1996, fulfills the requirements of Section 401 of the Act that New Hampshire adopt water quality standards consistent with the provisions of the Act.
2. Before the federal permit may be issued for a project under Section 404 of the Act, Section 401 of the Act requires the state to certify that the project will meet state water quality standards. To implement this provision of the Act, DES has adopted Section 401 water quality certification rules, at Env-Ws 451-455 under the authority of RSA 485-A:4, V.

3. Env-Ws 452.02 defines a discharge as "any addition of pollutants to the surface waters of the state, or release of water which alters the physical, chemical or biological condition of surface waters of the state."
4. Env-Ws 430.03(q) defines "discharge" as:
 - (1) The addition, introduction, leaking, spilling, or emitting of a substance to waters of the state, either directly or indirectly through the groundwater, whether done intentionally, unintentionally, negligently, or otherwise; or
 - (2) The placing of a substance in a location where the substance is likely to enter the waters of the state.
5. Env-Ws 430.03(aq) defines surface waters of the state as "streams, lakes, ponds and tidal waters within the jurisdiction of the state, including all streams, lakes, or ponds bordering on the state marshes, water courses and other bodies of water, natural or artificial. The term includes wetlands. The term does not include nontidal drainage ditches which were designed, built and used to convey wastewater or stormwater. It also does not include constructed wetlands, lagoons and other treatment systems designed and built solely as wastewater or stormwater treatment systems provided such facilities were not initially constructed in waters of the state or were not constructed to serve other mitigation purposes."
6. Env-Ws 430.02 provides that the water quality standards "shall apply to any person who causes point or nonpoint source discharge(s) of substance(s) to the surface waters of the state, or who undertakes hydrologic modifications such as dam construction, or any other activity that affects the beneficial uses of the surface waters of the state."
7. Env-Ws 455.02(c) provides that a water quality certificate may only be issued if construction or operation of the project will not violate surface water quality standards.
8. Env-Ws 430.21, Biological and Aquatic Community Integrity, provides that:
 - "(a) The surface water quality of the state shall support a healthy and diverse community of organisms that are in balance with their existing habitat and are indicative of a healthy ecosystem.
 - (b) Unless naturally occurring, only nondetrimental changes in community structure and function shall occur."
9. The placing of fill in a wetland to build the access roadway constitutes a discharge under the definitions of Env-Ws 430.03(q) and Env-Ws 452.02.

10. Development of the upland portions of the Project constitutes a discharge under the definitions of Env-Ws 430.03(q) and Env-Ws 452.02 due to nonpoint sources of pollutants.
11. The wetlands adjacent to the Project, including the wetlands subject to dredge and fill, and the other contiguous wetland of Great Bog, are surface waters of the state under Env-Ws 430.03(aq).
12. The Project constitutes an activity that affects the beneficial uses of the surface waters of the state under Env-Ws 430.02.
13. The wetland ecosystem provides habitat for numerous wildlife species including deer, fox, coyotes, raccoons, woodcock, ruffed grouse, and numerous migratory and resident songbirds.¹
14. Great Bog constitutes a seepage swamp wetland type, an unusual wetland type in New Hampshire.²
15. The wetland ecosystem contains state-significant plant communities and rare plants including Hairy-Fruited Sedge, Atlantic White Cedar, and Tufted Loosetrife.²

C. DETERMINATIONS

1. Maintenance of the seepage swamp hydrology depends upon maintenance of natural recharge relationships in the immediately adjacent upland areas.
2. The upland area of the Project within the Great Bog wetland complex constitutes an inseparable element of the wetland ecosystem for hydrology and for plant/animal communities.
3. Construction and subsequent operation of the Project as proposed will cause significant alteration of the natural recharge relationships in the upland areas immediately adjacent to Great Bog, including the amount, location, and timing of recharge as well as increases in pollutants due to nonpoint source runoff.

¹Letter dated July 7, 1999, from Wayne E. Vetter, Executive Director of the New Hampshire Fish & Game Department, to David Killoy, Chief, Permits and Enforcement Section, US Army Corps of Engineers, ref# 199802590.

²Letter dated November 24, 1997, from David VanLoven, Coordinator, Natural Heritage Inventory, NH Department of Resources & Economic Development, to Mr. David DesFosses, Millette Sprague Colwell.

4. Construction and subsequent operation of the Project as proposed will cause detrimental changes in the Great Bog wetland ecosystem community structure and function, including loss of plant and animal species abundance and diversity, especially the species listed in 13 and 15 above.
5. Construction of the Project will cause detrimental changes in community structure and function in the wetland aquatic ecosystem and in the wetland-dependent ecosystem on adjacent uplands, in violation of Env-Ws 430-21(b).

D. WATER QUALITY CERTIFICATION DENIAL

Based on the above determinations, DES hereby denies Water Quality Certification under Section 401 of the Act for the Project.

E. APPEAL

If you are aggrieved by this decision, you may appeal the decision to the Water Council. Any appeal must be filed within 30 days of the date of this decision, and must conform to the requirements of Env-Wc 200. Inquires regarding appeal procedures should be directed to Jim Ballentine, DES Council Appeals Clerk, 6 Hazen Drive, PO Box 95, Concord, NH 03302-0095; telephone (603) 271-6072.

COPY

Harry T. Stewart, P.E.
Director, Water Division

COPY

Robert W. Varney
Commissioner

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cc: Mark Mirabella, ACOE - FAX
Ted Jancowski, City of Portsmouth
Bill Ingham, Fish & Game
David VanLuven, DRED
Marcia Thunberg, OSP
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